

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARLO THOMAS.

Case No. 2:17-cv-00475-RFB-VCF

Petitioner.

v.

ORDER

TIMOTHY FILSON, *et al.*

Respondents.

15 Before the Court in this capital habeas corpus action is a motion filed by the
16 petitioner, Marlo Thomas, requesting that the action be stayed while he exhausts claims
17 in state court (ECF No. 27). The Court will grant that motion, and stay this case while
18 Thomas completes his state-court litigation.

19 Thomas was convicted of two counts of first degree murder, and other crimes, for
20 the murders of Carl Dixon and Matthew Gianakis. See Amended Petition for Writ of
21 Habeas Corpus (ECF No. 11), pp. 3-12. After a direct appeal, a state habeas action, then
22 a re-sentencing, followed by a further direct appeal and state habeas action, Thomas
23 initiated this federal habeas corpus action on February 14, 2017. See *id.* The Court
24 appointed the Federal Public Defender for the District of Nevada (FPD) to represent
25 Thomas (ECF No. 6), and, on August 1, 2017, with counsel, Thomas filed an amended
26 habeas petition (ECF No. 11).

27 Thomas filed his motion for stay on October 26, 2017 (ECF No. 27). Respondents
28 filed an opposition to the motion, and Thomas filed a reply (ECF Nos. 35, 40).

1 Thomas represents that he “filed an exhaustion petition in state court on October
2 20, 2017....” See Motion for Stay (ECF No. 27), p. 3.

3 In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court
4 circumscribed the discretion of federal district courts to impose stays to facilitate habeas
5 petitioners’ exhaustion of claims in state court. The *Rhines* Court stated:

6 [S]tay and abeyance should be available only in limited circumstances.
7 Because granting a stay effectively excuses a petitioner’s failure to present
8 his claims first to the state courts, stay and abeyance is only appropriate
9 when the district court determines there was good cause for the petitioner’s
10 failure to exhaust his claims first in state court. Moreover, even if a petitioner
11 had good cause for that failure, the district court would abuse its discretion
12 if it were to grant him a stay when his unexhausted claims are plainly
13 meritless. Cf. 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas
14 corpus may be denied on the merits, notwithstanding the failure of the
15 applicant to exhaust the remedies available in the courts of the State”).
16 * * *

17 [I]t likely would be an abuse of discretion for a district court to deny a stay
18 and to dismiss a mixed petition if the petitioner had good cause for his failure
19 to exhaust, his unexhausted claims are potentially meritorious, and there is
20 no indication that the petitioner engaged in intentionally dilatory litigation
21 tactics. In such circumstances, the district court should stay, rather than
22 dismiss, the mixed petition.

23 *Rhines*, 544 U.S. at 277-78.

24 *Rhines* does not state, or suggest, that every unexhausted claim in the petition
25 must satisfy, individually, the “good cause” and “potentially meritorious” requirements
26 before a stay is permitted. If a stay is warranted with respect to any single claim, the court
27 need not conduct a claim-by-claim analysis regarding the remaining claims. Thomas
focuses in his motion for a stay on Claims 13 and 14 of his amended petition. The Court
addresses only Claims 13 and 14.

28 Claims 13 and 14 are claims that Thomas’ federal constitutional rights were
violated as a result of ineffective assistance of his trial counsel. See Amended Petition for
Writ of Habeas Corpus (ECF No. 11), pp. 98-145. Thomas states that Claims 13 and 14
are unexhausted in state court. See *id.* at 126, 145. Thomas has shown – and
Respondents do not appear to dispute – that his amended petition is a “mixed petition,”
meaning it contains both exhausted and unexhausted claims. A federal court may not

1 grant habeas corpus relief on a claim not exhausted in state court. 28 U.S.C. § 2254(b).
2 The exhaustion doctrine is based on the policy of federal-state comity, and is intended to
3 allow state courts the initial opportunity to correct constitutional deprivations. See *Picard*
4 *v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present
5 the claim to the highest state court, and must give that court the opportunity to address
6 and resolve it. See *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v.*
7 *Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

8 With regard to the question of cause for his failure to exhaust Claims 13 and 14 in
9 his previous state habeas actions, Thomas asserts that the attorneys who handled his
10 state habeas actions performed ineffectively, failing to present the claims of ineffective
11 assistance of counsel in Claims 13 and 14. Motion for Stay and Abeyance (ECF No. 27),
12 pp. 4, 7-8.

13 In *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court held that “[w]here,
14 under state law, claims of ineffective assistance of trial counsel must be raised in an initial-
15 review collateral proceeding, a procedural default will not bar a federal habeas court from
16 hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral
17 proceeding, there was no counsel or counsel in that proceeding was ineffective.”
18 *Martinez*, 132 S.Ct. at 1320. In *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014), the court of
19 appeals held that the sort of ineffective assistance in an initial-review collateral
20 proceeding described in *Martinez* can be good cause for a *Rhines* stay. See *Blake*, 745
21 F.3d at 982-84.

22 Here, the Court finds that Thomas has shown good cause, under *Rhines*, for his
23 failure to fully exhaust Claims 13 and 14 in state court. The Court finds, further, that
24 Claims 13 and 14 are at least potentially meritorious. And, the Court finds that there is no
25 showing that Thomas has engaged in intentionally dilatory litigation tactics. Therefore, the
26 requirements for a stay of this action pending exhaustion of Thomas’ claims in state court,
27 as set forth in *Rhines*, are satisfied.

28

1 In exercising its discretion to grant the stay, the Court takes into account the
2 Nevada Supreme Court's holding in *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247
3 (1997), under which there is a possibility that the Nevada courts may consider, on their
4 merits, Thomas' unexhausted claims, upon a showing of ineffective assistance of
5 Thomas' prior post-conviction counsel.

6 The Court's intention is that this will be the last time that the Court imposes a stay
7 to facilitate Thomas' exhaustion of claims in state court. Thomas must exhaust all of his
8 unexhausted claims in state court during the stay imposed pursuant to this order.

9 **IT IS THEREFORE ORDERED** that Petitioner's Motion for Stay and Abeyance
10 (ECF No. 27) is **GRANTED**. This action is **STAYED**, while Petitioner exhausts, in state
11 court, his unexhausted claims for habeas corpus relief.

12 **IT IS FURTHER ORDERED** that, on or before December 15, 2018, Petitioner shall
13 file and serve a status report, describing the status of his state-court proceedings.
14 Thereafter, during the stay of this action, Petitioner shall file such a status report every 6
15 months (on or before June 15, 2019; December 15, 2019; etc.). Respondents may, if
16 necessary, file and serve a response to any such status report within 15 days after its
17 service. If necessary, Petitioner may reply within 15 days of service of the response.

18 **IT IS FURTHER ORDERED** that, following the conclusion of Petitioner's state
19 court proceedings, Petitioner shall, within 30 days, make a motion to lift the stay.

20 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a
21 motion by Respondents if Petitioner does not comply with the time limits in this order, or
22 if he otherwise fails to proceed with diligence during the stay imposed pursuant to this
23 order.

25 DATED: August 23, 2018.

26
27
28



RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE